

which appeared in her grounds of decision to loom very large in her thinking was that the contract was fraudulently negotiated by the defendant with one Lim Tuck Fatt, at that time the Business Manager of UMSM. It sought to create this impression partly by evidence that Lim Tuck Fatt was a relative of the defendant and partly by evidence that the contract was misplaced and not shown to the management until a search for it was made when the demand for the supply of steel in accordance with it was received. The contract was then said to have been found "amongst old files." The suggestion was that it was misplaced on purpose. But it would appear from the evidence that hitherto contracts entered into by officers of UMSM on behalf of UMSM were not required to be told to the Board or ratified by it or anybody on its behalf. Further there was no evidence and (in fact what evidence there was in the other contracts was to the contrary effect) that Lim Tuck Fatt had no authority to enter into contracts of sale and that he was required to advise the Board or the defendant in his capacity as the General Manager. The evidence of Carl Chow that "all contracts not in my knowledge are purported contract (and) no contract is a good contract without my knowledge even of contracts made before I became a General Manager." cannot be true of the facts at the time before his appointment. The earlier part is only true if there is evidence, which there is not, that any contract entered into by Managers and Asst. Managers must receive the prior approval of or be ratified by the General Manager. The second part is wrong in law. It is complete nonsense.

Now there had been a change in personnel. Carl Chow succeeded the defendant and presumably took over, amongst other things, the papers of UMSM from him. He could therefore not have been handed the contract unless it was with the defendant. The prosecution never said it was and did not adduce any evidence to this effect. Lim Tuck Fatt resigned some three months after the contract was concluded. Who succeeded him we are not told but if the contract was with Lim Tuck Fatt as the Business Manager, he would ordinarily have passed it over to his successor. His successor should therefore have been called to give evidence that he did not receive the contract from Lim Tuck Fatt. This was positive evidence which would establish satisfactorily that the contract was purposefully "hidden", a word which Carl Chow used but on being pressed in cross-examination, he withdrew but which the prosecution still contended was the fact from the circumstances. In my view, the failure to call Lim Tuck Fatt or his successor must raise, as a matter of evidence, the presumption under section 114(g) Evidence Act against the prosecution. The president sessions court was asked to do so. She refused. She might be right in respect of Lim Tuck Fatt alone but if she had considered the failure of the prosecution to call the successor to Lim Tuck Fatt after failing or refusing to call Lim Tuck Fatt, she would not, I feel confident, have refused to do so. In the absence of his successor, Lim Tuck Fatt in my respectful view was a necessary witness for the prosecution.

It is therefore obvious and beyond argument that the learned President Sessions Court had, with respect, not considered the whole evidence from all angles, as she ought to have done: see the judgment of the

A Federal Court in *Karam Singh v. Public Prosecutor*⁽⁸⁾ where it was held that

"In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused. Where the judge had omitted to view the relevant fact from all angles and the case was not put to the jury in a way to ensure due appreciation of the value of the evidence, there had been a miscarriage of justice."

B Failure to direct her own mind as a trial judge of fact, sitting alone, is of course the same as failure to direct the jury correctly. It is impossible to say whether had she not failed to do so, she would nevertheless have been "compelled to the one conclusion" of the defendant's guilt: see *Idris v. Public Prosecutor, supra* or held that "the circumstantial evidence must point irresistibly to the guilt of the accused," per Ismail Khan J. (as he then was) in *Public Prosecutor v. Lai Peng Yuen & Ors.*⁽⁹⁾

The appeal must therefore be allowed, the conviction quashed and the fine if paid refunded.

D

Solicitors: *Skrine & Co.*

Appeal allowed.

FAN YEW TENG v. GOVERNMENT OF MALAYSIA

[O.C.J. (Chang Min Tat J.) March 16, 1976]

E [Kuala Lumpur — Originating Summons No. 435 of 1975]

Administrative Law — Membership of Dewan Ra'ayat — Conviction for sedition and fine of \$2,000 — Disqualification — Jurisdiction of Dewan Ra'ayat — Whether court can interfere — Federal Constitution, arts. 48, 53 and 63.

Constitutional Law — Parliament — Member of — Decision on issue of disqualification — Federal Constitution, arts. 48, 53 and 63.

F

Practice and Procedure — Whether Government a necessary party.

G

The plaintiff applied for various declarations arising out of his conviction for sedition and a fine of \$2,000 imposed on him in the High Court ([1975] 1 M.L.J. 176). A motion had been introduced into the Dewan Ra'ayat that the question whether the plaintiff has become disqualified for membership of the House be referred to the Committee of Privileges. The plaintiff sought declarations in effect that he had a right to exhaust his legal right of appeal and to petition the Yang Diptuan Agung for a pardon before the Dewan Ra'ayat could take a decision in his disqualification; and that it was only the Dewan Ra'ayat and not the Committee of Privileges which could go into the question of his disqualification.

Held: (1) the decision on the issue of disqualification is for the Dewan Ra'ayat to take and when taken it is final and cannot be questioned in any court;

H

(2) the court cannot interfere with the right of the Dewan Ra'ayat to decide the question of the plaintiff being disqualified from membership and the reliefs sought by the plaintiff are outside the jurisdiction of the court;

(3) the Government of Malaysia cannot be a proper defendant from whom the reliefs sought, even if available, could be made, and therefore the Government was not a necessary party to the proceedings.

I

Cases referred to:-

- (1) *The Sheriff of Middlesex* (1840) 113 E.R. 149.
- (2) *Howard v. Gossett* (1845) 116 E.R. 139.
- (3) *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271.
- (4) *Sharma's Case* A.I.R. 1959 S.C. 395.
- (5) *Special Reference No. 1 of 1964* A.I.R. 1965 S.C. 745.
- (6) *Brundaban Nayak v. Election Commission of India & Anor.* A.I.R. 1965 S.C. 1893.

ORIGINATING SUMMONS.

Karpal Singh for the plaintiff.

Abu Talib bin Othman (Senior Federal Counsel) for the defendant.

Chang Min Tat J.: The plaintiff, a Member of Parliament, applies by way of an Originating Summons for various determinations and declarations arising from his conviction for sedition and a fine of \$2,000 in the High Court on January 13, 1975.

The conviction and fine imposed would appear to bring him within the scope of Article 48 of the Federal Constitution. This Article provides that —

“(1) Subject to the provisions of this Article, a person is disqualified for being a member of either House of Parliament if —

....

(e) he has been convicted of an offence by a court of law in the Federation... and sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand dollars and has not received a free pardon.”

Clause 3 of this Article provides, in its relevant parts, that —

“(3) The disqualification of a person under... paragraph (e) of Clause (1) may be removed by the Yang Dipertuan Agung and shall, if not so removed, cease at the end of the period of five years beginning with the date... on which the person convicted as mentioned in the said paragraph (e) was released from custody or the date on which the fine mentioned in the said paragraph (e) was imposed on such person...”

At least, one Member of Parliament thought so. He, Datuk Mohamed Rahmat, who is also the Deputy Minister of Co-ordination of Public Corporations on October 31, 1975, introduced in the Dewan Ra'ayat a motion that the question whether by reason of the conviction and sentence the plaintiff had become disqualified for membership of the house be referred to the Committee of Privileges and that the Committee be instructed to report to the House.

The motion was passed on November 4, 1975, and the matter was referred to the Committee of Privileges of the Dewan Ra'ayat. I understand that to date, the Committee of Privileges has not reported to the House. The plaintiff, probably not without reason, believes and fears that the process to disqualify him has started and therefore applies for certain declarations all designed to delay, at least for the time being, any action by the Dewan Ra'ayat, to such a purpose.

The plaintiff therefore prays for the following declarations:

- (1) that no question under article 53 of the Federal Constitution as to the plaintiff's disqualification for membership of the Dewan Ra'ayat has arisen by the plaintiff's mere conviction and fine of \$2,000 in default six months' imprisonment on January 13, 1975, (vide Selangor Criminal Trial No. 4 of 1974) on a charge under section 4(1)(c) of the Sedition Act (Revised 1969);
- (2) that the plaintiff has a constitutional right to exhaust his legal right of appeal to the Judicial Committee of the Privy Council and thereafter, if unsuccessful, to apply to His Majesty the Yang Dipertuan Agung for a free pardon before any

question as to his disqualification can arise under article 53 of the Federal Constitution;

- (3) that the Dewan Ra'ayat can only take a decision on the plaintiff's disqualification after he has exhausted his legal right to appeal to the Judicial Committee of the Privy Council and has thereafter unsuccessfully exercised his right to apply to His Majesty the Yang Dipertuan Agung for a free pardon;
- (4) that the plaintiff's pending appeal to the Judicial Committee of the Privy Council has rendered the matter *sub judice*;
- (5) that under article 53 of the Federal Constitution it is the Dewan Ra'ayat alone and no other authority or body which can go into the question relating to the plaintiff's disqualification as a member of the Dewan Ra'ayat.

The defendant to this summons is the Government of Malaysia.

I had on a previous occasion commented on the wrong use of the form of an Originating Summons for seeking declaratory orders of such a nature. On this occasion, though the submissions did not take this turn, it seems to me in the final analysis that the proper decision involves the proper and reasonable construction of certain Articles of the Federal Constitution and the form of an Originating Summons may well be the proper one.

The main contentions of the plaintiff are contained in his affidavit in support. They are firstly, that his conviction and fine are still not definite as he is in the process of applying for special leave to appeal from the Judicial Committee of the Privy Council, his appeal from the decision of the High Court to the Federal Court having been dismissed on July 16, 1975. He also contends that even if his appeal be not successful, he can nevertheless apply to His Majesty the Yang Dipertuan Agung for a free pardon and he says that until all these remedies have been exhausted, no proceedings for his expulsion from the House should be taken. His further ground is that no question as to his disqualification for membership of the House under Article 53 of the Federal Constitution has arisen by the mere fact of the conviction and fine. In his view, the Dewan Ra'ayat can only take a decision on his disqualification after he has exhausted “all his legal and constitutional right” of appeal to the Privy Council or failing the appeal, after his application for a free pardon from the Yang Dipertuan Agung has been rejected.

He has two other contentions. One is that only the Dewan Ra'ayat can go into the question of his disqualification. No other authority or body can. The other is that the matter, since it is going on appeal, is now *sub judice*.

Following a conditional appearance, Government within the time specified applies for the summons to be struck out on the following grounds:

- (a) that the Government of Malaysia is wrongly cited as the defendant to the proceedings;
- (b) that by the Originating Summons the plaintiff seeks reliefs outside the jurisdiction of this Ho-

nourable Court, namely reliefs designed to prevent members of the Dewan Ra'ayat from proceeding with a lawful part of parliamentary process of the Dewan Ra'ayat.

It also asks for costs.

At the hearing in Open Court on February 6, 1976, after the application by the Government had been adjourned from chambers when the plaintiff's counsel for acceptable reasons sought a postponement, both counsel did not ask me to deal with it in two stages, though logically, it would strictly be unnecessary for the court to consider the second of Government's contention however it might go into the very substance of the application, if the named defendant was dismissed from it as being the wrong party. Nevertheless, it would perhaps be more satisfactory if I deal with this second objection first.

An examination of the contentions of the plaintiff must establish clearly and beyond argument that the question whether a member of the Dewan Ra'ayat has become disqualified from membership by reason of his conviction and, in this case, a fine of not less than \$2,000 is a matter concerning the combined privileges of the Dewan as well as the individual privileges of the member. As Basu says in his Commentary on the Constitution of India, the justification for the individual privileges is the same as the collective privileges, namely the effective discharge of the functions of the House, which is not possible, unless the members are allowed to participate in its functions without disturbance or interruptions. The real question is what role the court has.

Now questions of the privileges of the Houses of Parliament and the proper role of the courts of law in such questions have arisen in a large number of cases both in England and in India. The position reached in England has been summarised by *Erskine May* in his *Parliamentary Procedure* (17th Edition) at page 173 thus:

- (1) It seems to be recognised that, for the purpose of adjudicating on questions of privilege, neither House is by itself entitled to claim the supremacy over the ordinary Courts of Justice which was enjoyed by the undivided High Court of Parliament. The supremacy of Parliament, consisting of the King and the two Houses, is a legislative supremacy which has nothing to do with the privilege jurisdiction of either House acting singly.
- (2) It is admitted by both Houses that since neither House can by itself add to the law, neither House can by its own declaration create a new privilege. This implies that privilege is objective and its extent ascertainable and reinforces the doctrine that is known by the courts.

On the other hand, the courts admit.

- (3) that the control of each House over its internal proceedings is absolute and cannot be interfered with by the courts,
- (4) that a committal for contempt by either House is in practice within its exclusive jurisdiction, since the facts consisting the alleged contempt need not be stated in the warrant of committal.

A This as the learned author stated, is the position reached by tacit consent. But he recognises that the decisions of the courts are not accepted as binding by the House in matters of privilege, nor the decisions of the House by the courts. In his words, the old dualism remains. However "since the House of Commons has not for a hundred years refused to submit its privileges to the decision of the courts, it may be said to have given practical recognition to the jurisdiction of the courts over the existence and extent of its privileges. On the other hand, the courts have always, at any rate at the last resort, refused to interfere in the application by the House of any of its recognised privileges" (*ibid.* pages 173-4).

C *S.A. de Smith* in his *Judicial Review of Administrative Action* (3rd Edition) at page 418 has this to say:

"The courts have no jurisdiction to restrain by injunction, or otherwise to pass upon, any conduct that forms part of proceedings in Parliament, even though the matter in issue is not directly connected with the process of legislation. In the well-known case of *Bradlaugh v. Gossett* the court refused to award the plaintiff an injunction against the Serjeant-at-Arms to restrain him from enforcing an order of the House of Commons requiring him to exclude the plaintiff from the House, or a declaration that the order of the House was void. Assuming that the plaintiff was right in his contention that the order of the House was based upon the misconstruction of a statute, nevertheless the courts had no jurisdiction to interfere, for the matter fell exclusively within the scope of the privilege of the House to regulate its own internal proceedings."

E In India, the Supreme Court has however refused to follow the English cases of *The Sheriff of Middlesex*,⁽¹⁾ *Howard v. Gossett*⁽²⁾ and *Bradlaugh v. Gossett*⁽³⁾ and has in at least two cases examined the validity of general warrants issued by the Speaker of a House of Parliament to punish for contempt of the privileges of the House. In *Sharma's*⁽⁴⁾ case, in answer to a call to show cause why he should not be punished for contempt for publishing in full the text of a speech delivered in Parliament against the order of the Speaker of the State legislature expunging parts of it, the Editor alleged that the notice to show cause and the action intended to be taken under the powers, privileges and immunities of the House provided in Article 194(3) of the Indian Constitution violated his rights under Article 19(1)(a) to freedom of speech and expression and under Article 21 to protection of his life or personal liberty except according to procedure established by law. The Supreme Court held by a majority that the power to punish for contempt was a subsisting privilege of the House, but that Article 19(1)(a) did not apply because under the rule of harmonious construction, in a case where Article 19(1)(a) was in direct conflict with Article 194(3) the particular provision in the latter Article would prevail over the general provision contained in the former. It further held that though Article 21 applied, it had not been contravened.

I But as pointed out by a latter Bench of the Supreme Court in another decision, in *Special Reference No. 1 of 1964, under Article 143 of the Constitution of India*,⁽⁵⁾ the Supreme Court in *Sharma's* case did not lay down any general proposition that whenever there was a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by

Part III, the latter must always yield to the former. What *Sharma's* case strictly decided was that Article 21 for the protection of life and personal liberty would apply. It means in other words that in its decision, Article 194(3) did not confer on any Indian State Legislature the right to commit by a general warrant which could not be examined for its validity by courts in *habeas corpus* or other proceedings. In the case of the *Special Reference* the Supreme Court held that though the warrants issued by the Speaker were general warrants, it was not contempt for anyone to present or for his advocate to argue or for the High Court judges to entertain a petition challenging the validity of the warrants of committal. It held that the particular claim by the House that its general warrants must be held to be conclusive could not be deemed to be part of its privileges under the latter part of Article 194(3).

The material provisions of the Constitution considered by the Supreme Court were mainly Article 226(1) and Article 32. Article 226(1) confers very wide powers on the High Court to issue prerogative writs to safeguard the fundamental rights guaranteed by the Constitution. Article 32 which is in these words:

"32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warrant* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3)

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution."

confers on the people of India the right to move the Supreme Court for breach of their fundamental rights and the Supreme Court considered that that itself was a fundamental right. The Supreme Court held that the very existence of the powers of the High Court and of the Supreme Court under these two Articles necessarily implied a right in the citizen to approach the High Court or the Supreme Court for the protection of his fundamental rights.

The Supreme Court also considered Article 208(1). This Article provides that a House of the Legislature of a State may make rules for regulating, subject to the provisions of the Constitution, its procedure and the conduct of its business. The court thought that where the House made rules for exercising its powers under the latter part of Article 194(3), those rules must be subject to the fundamental rights of the citizens. The corresponding Article in respect of Parliament is Article 118(1).

Further, Article 212 provides that the validity of any proceedings in the Legislature of a State (in Parliament, Article 122) shall not be called in question on the ground of any alleged irregularity of procedure. The Supreme Court considered that if the impugned procedure was illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny would be prohibited if the complaint against the procedure was no more than that the proceedings were irregular.

A Having regard to these provisions in the Constitution for the safeguard of the fundamental rights, the Supreme Court thought that in dealing with the effect of the provisions of Article 194(3) whenever it appeared that there was a conflict between these provisions and the fundamental rights, an attempt would have to be made to resolve the said conflict by the adoption of the rule of harmonious construction, as in *Sharma's* case.

B With regard to Malaysia, with a written constitution as in the case with India, the first consideration is of course the examination of the particular provisions of our Constitution, as compared to or contrasted with those of the Indian Constitution.

C Parliamentary privileges unlike those in India have not been spelled out. They are merely referred to in the marginal note in the written Constitution in Article 63. Clauses (2) and (3) of Article 63 however correspond to Article 194(2) and Article 105(2) of the Indian Constitution.

D Another dissimilarity with the Indian Constitution lies in the role of the courts of law. Articles 212 and 122 of the Indian Constitution which restrict the enquiry in a court into the validity of any proceedings in the Legislature of a State and of Parliament respectively are absent in their form in the Federal Constitution. What we have is Article 63 which in term prohibits questioning in any court the validity of any proceedings in either House of Parliament or any committee thereof.

E Further, the power given by the Indian Constitution to the High Court and the Supreme Court by Articles 226 and 32 respectively to issue directions orders or writs for the enforcement of any of the rights conferred by Part III, i.e. the fundamental rights or for any other purpose is absent from the Federal Constitution. F The right is conferred by rule 1 of the schedule to the Courts of Judicature Act 1964 and while I do not conceive that any High Court in this country will have any less hesitation in enforcing the fundamental liberties of the subject or citizen by entertaining such actions than the courts in India, there is still a distinction between a legal right and a constitutional right, however slight it may be.

G For Article 208(1) of the Indian Constitution (its parallel for Houses of Parliament being Article 118), with regard to the powers to make rules of procedure, we have Article 63.

H At this stage, it will perhaps be convenient to set out in full Articles 53 and 63 of our Constitution.

"Article 53. Decisions as to disqualification.

If any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final:

Provided that this Article shall not be taken to prevent the practice of the House postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification)."

I Article 63. Privileges of Parliament.

"(1) The validity of any proceedings in either House of Parliament or any committee thereof shall not be questioned in any court.

(2) No person shall be liable to any proceedings in any court in respect of anything said or any vote given by him when taking part in any proceedings of either House of Parliament or any committee thereof.

(3) No person shall be liable to any proceedings in any court in respect of anything published by or under the authority of either House of Parliament.

(4) Clause (2) shall not apply to any person charged with an offence under the law passed by Parliament under Clause (4) of Article 10 or with an offence under the Sedition Act, 1948 as amended by the Emergency (Essential Powers) Ordinance No. 45, 1970."

As I have said before, it seems to me that the claim of the plaintiff to continue to sit as a member of the Dewan Ra'ayat is basically a matter concerning his particular or personal privilege set against the combined privilege of all the members to determine the plaintiff's right. No issue arises as to any conflict between the plaintiff and his fundamental liberties. This court is therefore not concerned with any such determination.

The issue in his application is the right of the plaintiff to sit in the Dewan Ra'ayat and, in my view and with respect, this issue comes fully within the compass of Article 53 and Article 63. The issue therefore involves the proper and reasonable construction of these Articles. The language is plain and unambiguous. Giving the words therein their plain and grammatical meaning, the decision on this issue is for the House to take, it is final when taken and the validity of the proceedings cannot be questioned in any court. These Articles can admit of no other construction.

And this is a principle recognised fully by the plaintiff himself, since in paragraph 11 of his affidavit he affirms and in his fifth prayer he wants the court to declare that it is the House and the House alone which can decide this issue.

But it would appear and it is for a time so argued that the plaintiff objects to the reference to the Committee of Privileges. The objection is originally on the ground that this is an unauthorised delegation and a derogation of the powers of the House, but Mr. Karpal Singh soon abandons this line of argument. He is undoubtedly correct, as otherwise, it would ignore the words "or any committee thereof" in Article 63(1).

If that is so, then it seems to me that he has himself provided the answer to his client's case in his own admission.

But it is also argued by and for the plaintiff that the time is not yet and that the court should tell the defendant (and, I suppose, tell the Dewan Ra'ayat through the Government of Malaysia) that no decision could be taken until after the rejection of his appeal to the Privy Council and of his application for pardon. But this contention depends on a particular construction being put on the opening words of Article 53: "if any question arises whether a member of a House of Parliament has become disqualified..." If the proper construction is that the question does not arise until the exhaustion of all remedies available to him by appeal or pardon, as would appear to be contended by the plaintiff, then it is still a matter for his submission to the forum where the decision is to be taken. It does not seem to be a matter for the interference of the court. But with respect, the proper and reasonable construction of this conditional clause does not appear to be as contended by the plaintiff.

In the case of *Brundaban Navak v. Election Commission of India & Anor.*,⁽⁶⁾ the Supreme Court

A of India was called upon to construe the words "if any question arises as to whether a member of a House of the Legislature of a State has been subject to... disqualification..." under Article 192(1) (compare Article 103 with reference to the House of Parliament), words similar to those in our Article 53. Under the other provisions of Article 192, the question would be referred to the Governor who would then seek the advice of the Election Commission and answer it accordingly. His decision would be final. In that case, however, the question was raised as a matter of fact by a member of the public. Counsel for the member who was said to have incurred disqualification after his election contended that the question could not be raised by an ordinary citizen or voter in the form of a complaint to the Governor but conceded in no uncertain terms that such a question could be raised on the floor of the Legislative Assembly and by members of the Assembly. The Supreme Court rejected this argument about the outsider and held at page 1896:

"It is significant that the first clause of Article 192(1) does not permit of any limitations such as Mr. Setalvad suggests. What the clause requires is that a question should arise; how it arises, by whom it is raised, are not relevant for the purpose of this clause."

In the case under discussion, the question was raised by a Member of Parliament. No complaint is made in this court as to his capacity to do so, and with respect, in my view, none can possibly be made. What I have strictly to decide is therefore whether such a question as asked by this Member of Parliament has arisen, and following the decision of the Supreme Court of India, I must conclude that on a proper and reasonable construction, what Article 53 requires is that the question should arise. How it arises and in what circumstances it is raised are not relevant for the purpose of this clause.

F On this construction, I must necessarily go on to hold that this court cannot interfere with the right of the Dewan to decide the question of the plaintiff becoming disqualified for membership or the corresponding right to the Dewan under the proviso to Article 53 to decide, if it be so minded, postponing taking a decision in order to allow for the appeal to be heard or for the plaintiff to make an application for pardon.

G With respect, I am therefore of the opinion that the reliefs sought by the plaintiff are outside the jurisdiction of the court.

H As to the question whether the Government of Malaysia is wrongly cited as the defendant to these proceedings, the contentions of the plaintiff, put in a nutshell, are that the Government is a necessary party because it is interested in his expulsion and anyone who is interested could be cited as a defendant. The latter contention is plainly untenable. The former, when examined, obviously ignores the doctrine of the separation of powers provided in our Constitution and however Government as distinct from members of the Legislature may be said to be interested, it also ignores the fact that in the final say, it is the House itself which is concerned with and which alone has the powers to determine the question of its membership. The plaintiff himself must know this to be the whole truth. To be a member of the House does not necessarily mean that the member is part of the Executive or Govern-

ment. This is true as much for back-benchers as for members of the Opposition. To contend otherwise is to denigrate from the dignity and standing of the House as one arm of the sovereignty of the nation.

This will be readily appreciated when it is realised that one of the most important of the Speaker's functions is to protect the House against the powers and encroachments of the Executive and to protect minorities within the House itself. As Colonel Clifton Brown said on his re-election as Speaker in 1945, "As Speaker I am not the Government's man, nor the opposition's man. I am the House of Commons's man and, I believe, above all, the back-bencher's man." And so far as membership of the House is concerned, in the words of W.J. Brown as cited by Martin Lindsay in his booklet on the House of Commons, "The humblest back-bencher is no less than a member and the greatest Minister is no more than a member, in respect of his Parliamentary rights."

The high water mark of the independence of the House of Commons from the Executive was reached in the reign of Charles I when Speaker Lenthall resisted the attempt of the Monarch to look for and arrest five members of the House of Commons in these classic words: "May it please Your Majesty, I have neither eyes to see nor tongue to speak in this place, but as this House doth direct me, whose servant I am." Whether the independence of the Dewan Ra'ayat is to reach and be maintained at this mark, it is for the members, amongst them, the plaintiff himself, as elected representatives of the electorate in their separate constituencies for whom they speak, to decide, but quite clearly, in respect of the disqualification of the plaintiff, neither Datuk Mohamed Rahmat nor any member of the Government is interested or can vote save as a member of the House.

On such a view which with respect seems to me to be the only proper one, the Government cannot be the proper defendant from whom the reliefs sought, even if available, could be made.

Upon both conclusions, I must hold that the objection of Government is well taken. The Government is not a necessary party to the proceedings.

In the result, the plaintiff's application is dismissed with costs.

Application dismissed.

Solicitors: *Karpal Singh, Wong & Co.*

PUBLIC PROSECUTOR v. YEONG YIN CHOY

[R.Cr.J. (Abdoolcader J.) April 21, 1976]

[Ipoh — Perak Criminal Revision No. 20 of 1976]

Criminal Law and Procedure — Offence punishable with imprisonment or fine — Whether Magistrate can exercise powers under section 294 of Criminal Procedure Code — Criminal Procedure Code (F.M.S. Cap. 6), ss. 173A and 294.

In this case the accused who was 29 years of age had been convicted on his plea of guilty on two charges of voluntarily causing hurt to two persons with a chopper under section 324 of the Penal Code — an offence punishable with imprisonment for a term which may extend to three years or with fine or with whipping or with any two of such punishments. The learned Magistrate on considering the age of the accused, the probation report and the circumstances of the case applied the provisions of section 294 of the Criminal Procedure Code and directed that he be released on his entering into a bond with sureties. He subsequently referred the papers in the case to the High Court for review as he doubted the correctness and legality of his order in view of the decisions of the High Court which seem to suggest that an order under section 294 of the Criminal Procedure Code can only be made where the offence is punishable with imprisonment without the option of a fine.

Held: the provisions of section 294 of the Criminal Procedure Code are applicable in the case of conviction for an offence punishable with imprisonment whether with or without the option of a fine or other alternative penalties and in the circumstances of the case there was no reason to interfere with the order of the Magistrate.

Cases referred to:-

- (1) *Public Prosecutor v. Idris* [1955] M.L.J. 234, 235.
- (2) *Re Eng Chung Lum* [1964] M.L.J. 10.
- (3) *Re Badri bin Abas* [1971] 1 M.L.J. 202.
- (4) *Public Prosecutor v. Loo Choon Fatt* [1976] 2 M.L.J. 256.
- (5) *Engineering Industry Training Board v. Samuel Talbot (Engineers) Ltd.* [1969] 2 Q.B. 270, 274.
- (6) *Lee Mun Foong v. Public Prosecutor* [1976] 2 M.L.J. 16.
- (7) *Public Prosecutor v. Teh Ah Cheng* [1976] 2 M.L.J.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the Public Prosecutor.

Accused not present.

Abdoolcader J. (delivering oral judgment): The accused who is 29 years of age was convicted in the Magistrate's Court at Ipoh on March 27, 1976 on his plea of guilty on two charges of voluntarily causing hurt to two persons with a chopper under section 324 of the Penal Code — an offence punishable with imprisonment for a term which may extend to 3 years, or with fine, or with whipping or with any two of such punishments.

On the matter of sentence, the accused on his first arraignment in court, presumably in a fit of passion or depression or in a gesture of self-immolation or hopeless despair, whichever it was, promptly proclaimed his preference for the gallows, but the Magistrate wisely ignored this outrageous and bizarre request and on considering his plea in mitigation, a probation report and the circumstances of the case, applied the provisions of section 294 of the Criminal Procedure Code and directed that he be released on his entering into a bond in respect of each charge with 2 sureties in the sum of \$1,000 for a period of 2 years and imposed conditions in such bonds under section 294A of the Code.